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No. 91-1904

Supreme Court, U.S.
FILED
JUN 26 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEONARD L. FINZ,

Petitioner,

—against—

STUART A. SCHLESINGER; JULIEN, SCHLESINGER AND FINZ, P.C.; JULIEN AND SCHLESINGER, P.C.; JULIEN AND SCHLESINGER; STUART A. SCHLESINGER, doing business as Julien and Schlesinger, P.C.; THE JULIEN AND SCHLESINGER EMPLOYEE RETIREMENT FUND; THE JULIEN AND SCHLESINGER P.C. EMPLOYEES RETIREMENT TRUST; PLAN DOE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals violate the Equal Protection Clause of the United States Constitution when it took into account petitioner's education and business background in determining whether petitioner's waiver of his ERISA rights was knowing and voluntary?

PARTIES TO THE PROCEEDING

The names of all of the parties appear in the caption. Respondents have no parent companies, subsidiaries, or affiliates.

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CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states:

> No State . . . shall . . deprive any person of life, liberty or property, without due process of law; nor deny within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE

The 1984 Settlement Between Petitioner and Respondents

Petitioner Leonard Finz is an attorney and former New York State Supreme Court Justice. From January 1978, when he left the bench, until April 10, 1984, petitioner was an attorney at the New York City law firm of respondent Julien & Schlesinger. Petitioner alleges that he was induced to join the firm because he wanted a guaranteed pension. (Pet. App. 42).[1/]

In April 1984, a dispute erupted between petitioner and Julien & Schlesinger concerning petitioner's pension rights: petitioner claimed he was entitled to pension benefits, while respondents insisted he was not. Accordingly, on April 10, 1984, petitioner left the firm. Petitioner immediately set up practice with Michael Wolin, at the time another Julien & Schlesinger attorney. (Id.).

More than three weeks later and to avoid litigation, petitioner and Mr. Wolin on one hand and respondents on the other settled all their differences. On May 4, 1984, they signed a settlement agreement and general releases. (Id. at 43).

1/ "Pet. App." references the appendix to the Petitioner's Brief.

The settlement agreement specifically states that petitioner believed he was wrongfully deprived of his pension benefits -- the very claim he seeks to prosecute in this action -- but nevertheless agreed to release respondents of this and all claims in exchange for substantial consideration, including $75,000. (Id. at 43-44).

The settlement aggreement declared:

> [Petitioner] states that to his knowledge and during or prior to the period of his employment with [respondents], he was neither issued, nor did he receive any stock interest in the "JULIEN & SCHLESINGER EMPLOYEE RETIREMENT FUND DATED JUNE 11, 1974" or any other pension or profit sharing plan which may have existed or any parties claim to have existed with regard to the firms of [respondents], which [petitioner] claims was in existence during the period of his employment with [respondents] and as such is or was entitled to the benefits thereunder provided as a covered employee....

(Id. at 43) (emphasis added).

> [Respondents] deny that [petitioner] is entitled to any stock interest or equity interest whatsoever with regard to the "JULIEN & SCHLESINGER EMPLOYEE RETIREMENT FUND DATED JUNE 11, 1974" or any other pension or profit sharing plan which may have existed or any parties claim to have existed with regard to the firms of [respondents] as hereinabove claimed by [petitioner] in this paragraph.

(Id. at 21). The settlement agreement then explicitly disposed of these claims, requiring the execution of a general release in favor of respondents:

> As a consequence of the dispute which exists based upon the claims made by [petitioner] and the denials of those claims by [respondents] as set forth in

> this paragraph, the aforenamed [petitioner and respondents] hereby resolve, settle and compromise their differences as evidenced by the general releases executed by [petitioner] and the remaining parties to this Agreement as consideration therefore, annexed hereto as Appendix "A."

(Id. at 43).

Petitioner's Allegations of Concealment

Despite the plain language of the settlement disposing of his ERISA claims, petitioner in this lawsuit seeks to revive those very claims put to rest in the 1984 agreement. He has asserted that he was unlawfully deprived of his pension rights in violation of the Employee Retirement Income Securities Act, 29 U.S.C. §§ 1001 et seq. (1988) ("ERISA"). Specifically, petitioner asserts that respondents wrongfully led him to believe that he was not covered by the Julien & Schlesinger retirement plan and thus fraudulently induced him to sign a waiver releasing them from liability for payments under the plan. (Id. 41-42). Petitioner has also asserted a common law claim of fraud.

The Decision by the District Court

After initially denying respondents' summary judgment motion, on June 6, 1991 the District Court granted respondents' motion for reargument and, upon reconsideration, granted summary judgment, holding that the parties' 1984 settlement and releases barred petitioner's claims. (Id. at 62-75).

First, the Court dismissed petitioner's fraud claim: "[a]s [petitioner] admitted in the [settlement] Agreement, he believed, despite [respondents'] alleged misrepresentations, that he was entitled to benefits under [respondents'] retirement plan. Notwithstanding that belief, [petitioner] like any settling claimant, voluntarily waived his claim as part of

the settlement agreement. Because [petitioner] cannot establish reliance upon [respondents'] alleged fraud, [respondents] are entitled to summary judgment on [petitioner's] fraud claim." (Id. at 63-64).

As for petitioner's ERISA claim, at petitioner's urging the District Court applied a "totality of circumstances" test rather than ordinary contract principles in determining whether petitioner's waiver was effective. (Id. at 64-75). See Laniok v. Advisory Comm., 935 F.2d 1360 (2d Cir. 1991). The District Court held that the 1984 settlement met that standard. The settlement agreement and releases were "in writing and are clear and specific" (A. 69), and petitioner received adequate consideration for relinquishing his ERISA claims. (Id. at 71-74). Additionally, "[a]s a practicing attorney, who spent twelve years as a state court judge, [petitioner] was adequately aware of his legal rights. Even if he was unfamiliar with ERISA, there [was] no indication that he was denied the opportunity to consult with counsel." (Id. at 69).

On the issue of whether respondents' disclosure was "full and accurate," the Court held that "to the extent [petitioner] was not adequately informed of the details of the ERISA plan, he waived his right to be so informed when entering into the settlement agreement," and that, as reflected in petitioner's own testimony in a related matter as well as the settlement agreement itself, "[petitioner] was aware of his claium [sic] against the plan." But "[i]nstead of pressing his right to more information, [petitioner] settled his claims against the [respondents]," thereby precluding revival of his ERISA claim in this action. (Id. at 70-71).

The Decision by the Court of Appeals

On February 25, 1992, the Second Circuit Court of Appeals unanimously affirmed the lower court's grant of summary judgment dismissing petitioner's complaint. (Id. at 40-51).

The Panel concluded that a "totality of circumstances" test should apply in determining whether petitioner's ERISA waiver was made "knowingly and voluntarily." (Id. at 46). The criteria under this test, as elucidated by the Panel, include:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. at 46-47. See also Laniok, 935 F.2d at 1365.

Although petitioner alleged that his waiver was not made knowingly and voluntarily, the Panel held otherwise. It cited the language of the settlement agreement, which specifically stated that petitioner knew of his ERISA rights but nevertheless agreed to waive them: "[Petitioner], who at all times believed that [respondents] were misrepresenting his entitlement to benefits, should not be permitted to strike a better bargain at this late date by claiming that he signed the [settlement] agreement in reliance on [respondents'] misrepresentations." (Id. at 50).

The Court also held that respondents' failure to provide petitioner with details concerning the pension plan "is not dispositive, since it is clear that [petitioner], an astute lawyer, knew exactly the bargain he was making." (Id.).

THE REASONS FOR DENYING THE WRIT

Petitioner asserts that, in assessing the effect of his ERISA release, the Court below violated the Equal Protection Clause by "creating and distinguishing a new class of employees to whom ERISA disclosure requirements do not provide protection, i.e. those employees who are 'well educated.'" (Pet. Br. at 5-6). But petitioner is mistaken: because the decision below was entirely correct and does not conflict with any decision of this Court or any Court of Appeals, the petition presents no special or important issue worthy of a writ of certiorari.

I. The Court of Appeals Decision was Correct

As a preliminary matter, and in framing the issue for this Court, petitioner has misstated the Court of Appeals' holding. Rather than improperly carving out any sub-class of "well educated" employees, the Court merely held that petitioner's education and business experience was one of a half-dozen factors that the Court could consider in determining the effect of the ERISA settlement agreement. Ironically, in its brief to the District Court and Court of Appeals below, petitioner urged that the Court apply this "totality of circumstances" test -- including the factor of an employee's education and business experience -- rather than a less stringent contract analysis proposed by respondents.

In taking into account petitioner's background and education under the totality of circumstances test, the Court below clearly did not violate the Equal Protection Clause.

Since the issue of the validity of ERISA waivers implicates no suspect class and impinges on no constitutionally protected right, the Court of Appeals' decision is reviewed under the deferential "rational basis" Equal Protection scrutiny. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989). As this Court recently put it:

> we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.

Pennell v. City of San Jose, 485 U.S. 1, 14 (1988), quoting Vance v. Bradley, 440 U.S. 93, 97 (1979).

Under this standard, "which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause," as long as the classification "'has some reasonable basis, it does not offend the Constitution.'" Stanglin, 490 U.S. at 26 (citation omitted). See also Allegheny Pittsburgh Coal Co. v. Coventry Comm'n, 488 U.S. 336, 344 (1989) (state classification will be upheld under Equal Protection Clause if it is "neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy") (citation omitted).

It was not arbitrary or unreasonable for the Court below to consider petitioner's background as an attorney and former State Court Justice. Quite obviously, the intelligence and business background of an employee is a critical factor in assessing whether he is aware of what he is doing in giving up ERISA rights. In fact, this factor is particularly apt in this case since, as a lawyer and veteran jurist, petitioner was uniquely positioned to understand the legal effect of a settlement and waiver agreement on his subsequent ability to revive his ERISA claims.

The Supreme Court has repeatedly held that even when assessing the effectiveness of waivers of fundamental constitutional rights -- which triggers strict scrutiny under the Equal Protection Clause -- the education of the party waiving the right can and should be considered. For example, in determining whether statements obtained during custodial

interrogation are admissible against the accused and whether the accused has knowingly and voluntarily waived his constitutional right to remain silent and to have assistance of counsel, the Court has held that the totality of circumstances surrounding the interrogation must be considered. Miranda v. Arizona, 384 U.S. 436 (1966). In Fare v. Michael C., 442 U.S. 707, 725 (1979), this Court specifically held that in the case of a juvenile's waiver of those constitutional rights, "[t]he totality approach permits -- indeed, it mandates -- inquiry into all the circumstances surrounding the interrogation," including "evaluation of the juvenile's age, experience, education, background, and intelligence. . . ." (emphasis added). See also Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (in determining whether a suspect's confession was voluntary, the education and intelligence of the suspect should be considered).

Since this Court has approved consideration of a party's educational background in assessing waivers of fundamental rights -- where the strict scrutiny Equal Protection test applies -- a fortiori, the Court below was on firm constitutional footing in taking into account petitioner's position as an attorney and former State Supreme Court Justice in assessing his waiver of rights that are merely statutory. On this ground alone, the writ should be denied.

II. There is no Conflict in the Circuits

A second and independent reason for denying the writ is that there is no conflict in the Circuits as to whether it is a violation of the Equal Protection Clause to consider an employee's education and business background in determining the effect of a waiver of ERISA or similar statutory rights.

A number of Circuit Courts have concluded that an employee's education and background are part of the totality of circumstances in evaluating the validity of an ERISA waiver. See, e.g., Laniok v. Advisory Committee, 935 F.2d 1360, 1367-68 (2d Cir. 1991); Leavitt v. Northwestern Bell Telephone Co., 921 F.2d 160, 162 (8th Cir. 1990).

In similar fashion, four Circuit Courts have included this factor as part of the totality of circumstances in assessing waivers of age discrimination claims. See Gormin v. Brown-Forman Corp., 1992 U.S. App. LEXIS 13379 (11th Cir. June 15, 1992); O'Hare v. Global Natural Resources, 898 F.2d 1015, 1017 (5th Cir. 1990); Bormann v. AT&T Communications, 875 F.2d 399, 403 (2d Cir.), cert. denied, 493 U.S. 924 (1989); Coventry v. United States Steel Corp., 856 F.2d 514, 523 (3d Cir. 1988). See also Stroman v. West Coast Grocery Co., 884 F.2d 458, 462-63 (9th Cir. 1989) (applying totality of circumstances test, including factor of employee's education and business background, to waiver of Title VII claim), cert. denied, ___ U.S. ___, 111 S. Ct. 151 (1990); Torrez v. Public Service Co., 908 F.2d 687, 689 (10th Cir. 1990) (same).

In none of these cases did any Court of Appeals conclude that consideration of an employee's education violated the Equal Protection Clause -- since, as set forth at pages 6-8 above, it clearly does not. Given petitioner's failure to demonstrate any conflict among the Circuit Courts -- the principal ground for granting certiorari, see Supreme Court Rule 10.1(a) -- a writ in this case is entirely unwarranted.[2/]

2/ It is also worth noting that even though the District Court cited petitioner's education and position as an attorney in holding that the ERISA waiver was valid, petitioner never raised his Equal Protection claim before the Court of Appeals. This Court has long applied the principle that, only in exceptional circumstances not found here, it will not review an issue that was not raised properly below -- another ground for denying the writ. See Delta Air Lines v. August, 450 U.S. 346, 362 (1981) (the "question [of the district judge's abuse of discretion] was not raised in the Court of Appeals and is not properly before us"); Duignan v. United States, 274 U.S. 195, 200 (1927) ("[i]t is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 25, 1992